(1) 89-1285

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1989

AERON MARINE COMPANY
Cross-Petitioner

VERSUS

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERARD T. GELPI *
RANDALL C. COLEMAN, III
Gelpi, Sullivan, Carroll & Laborde
430 Notre Dame Street
New Orleans, Louisiana 70130
Telephone: (504) 524-9714
Counsel for Cross-Petitioner

---

* Counsel of Record

18 pp

QUESTION PRESENTED FOR REVIEW

In a case involving a shipboard assault, may the federal courts rule as a matter of law that the assault itself, without regard to other factors, is sufficient to render a vessel unseaworthy and disregard the specific factual finding of the jury, after review of all the evidence and consideration of numerous factors going to the unseaworthiness issue, that the vessel was not unseaworthy?

LIST OF PARTIES

In addition to the parties set forth in the caption, the affiliated companies of the corporate cross-petitioner include Apex Marine Corporation, Westchester Marine Shipping Co., Inc., and Archon Marine Company. The original action brought by cross-respondent Mercedel W. Miles also was brought on behalf of Joseph Torregano, the decedent's father.

TABLE OF CONTENTS

Page

Question Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 11

TABLE OF AUTHORITIES

Page

Boudoin v. Lykes Bros. Steamship Company, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955) 4, 5, 9, 10, 12

Claborn v. Starfish & Oyster Co., Inc., 578 F.2d 983 (5th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) 5, 6, 9

Clevenger v. Starfish & Oyster Co., Inc., 325 F.2d 397 (5th Cir. 1960) 5, 6, 9

Dunlap v. G&C Towing, Inc., 613 F.2d 493 (4th Cir. 1980) 4

Harbin v. Interlake Steam Ship Company, 570 F.2d 99 (6th Cir. 1978), *cert. denied*, 437 U.S. 905 (1978) 10

Jones v. Lykes Bros. Steamship Co., 204 F.2d 815 (2d Cir. 1953), *cert. denied*, 346 U.S. 857 (1953) 7

Jordan v. United States Lines, Inc., 738 F.2d 48 (1st Cir. 1984) 4

Mears v. American Export Lines, Inc., 457 F.Supp. 846 (S.D. N.Y. 1978) 10

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (5th Cir. 1989) 5, 6

Smith v. Lauritzen, 356 F.2d 171 (3rd Cir. 1966) 6, 7

Walters v. Moore-McCormick Lines, Inc., 309 F.2d 191 (2d Cir. 1962), *petition denied* 312 F.2d 893 (1963) 7

Statutes and Other Authorities

46 U.S.C. §688 3

W. Keeton, D. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts* (5th Ed. 1984) 11

In the
Supreme Court of the United States

OCTOBER TERM, 1989

AERON MARINE COMPANY
Cross-Petitioner

VERSUS

MERCEDEL W. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF LUDWICK ADAM TORREGANO
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 11, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 882 F.2d 976.

JURISDICTION

The judgment of United States Court of Appeals for the Fifth Circuit was entered on September 11, 1989. A timely petition for rehearing was denied on October 11, 1989. Cross-respondent filed her petition for certiorari within 90 days of that date. This cross-petition for writ of certiorari is filed within 30 days of January 10, 1990, the date on which cross-petitioners received cross-respondents' petition for writ of certiorari, in accordance with Rule 19.5 of the Supreme Court Rules.

STATEMENT OF THE CASE

This litigation arises out of the stabbing and death of a steward's assistant, Ludwick Torregano, aboard the M/V ARCHON when she was docked at the port of Vancouver, Washington, on July 18, 1984. There were no witnesses to the incident, but the police investigation resulted in the arrest and subsequent conviction of second degree murder of the vessel's chief cook,

Clifford Melrose. As of the time of trial of this matter, the appeal filed on behalf of Melrose had not been heard.

Melrose was a member of a seamen's union which assigned him to work aboard the M/V ARCHON pursuant to a rotary shipping board in accordance with internal union policies. Neither cross-petitioner Aeron Marine Company nor any of the related vessel interests had any say as to which union members would serve aboard the vessel.

The decedent's mother, on behalf of herself and the decedent's father, filed suit against the vessel interests alleging negligence under the Jones Act, 46 U.S.C. §688, and unseaworthiness of the M/V ARCHON under the general maritime law. At trial, the jury determined that certain of the vessel interests, Apex Marine Corporation, Westchester Marine Shipping Company, and Archon Marine Company, were negligent under the Jones Act. The jury further found, in response to a specific jury interrogatory, that the M/V ARCHON was not unseaworthy. Judgment was entered in favor of cross-petitioner, Aeron Marine Company, as the owner/bareboat charterer of the M/V ARCHON, on the unseaworthiness issue. The trial court denied the post-judgment motion of plaintiff for

judgment non obstante veredicto on the unseaworthiness count.

The Court of Appeals for the Fifth Circuit affirmed the judgment to the extent it reflected the factual findings of the jury except the jury's factual finding that the decedent was 7% contributorily negligent and the specific factual finding that the M/V ARCHON was not unseaworthy. The Fifth Circuit held, as a matter of law, that the M/V ARCHON was unseaworthy.

REASONS FOR GRANTING THE WRIT

The determination of the Fifth Circuit, as a matter of law, that the vessel was unseaworthy, despite a contrary finding by the jury, unjustifiably expands this Court's decision in *Boudoin v. Lykes Bros. Steamship Company*, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354 (1955) and is contrary to the well recognized rule that the unseaworthiness issue is a matter for determination by the jury. *Jordan v. United States Lines, Inc.*, 738 F.2d 48, 50 (1st Cir. 1984); *Dunlap v. G&C Towing, Inc.*, 613 F.2d 493, 496 (4th Cir. 1980).

In holding that the district court erred in failing to grant plaintiff's motion for judgment notwithstanding the verdict, the court below concluded:

> The savagery of the attack itself leads us to conclude that Melrose had an especially dangerous disposition. As a matter of law, Melrose failed to measure up to the standard of his calling and rendered the vessel unseaworthy.

Miles v. Melrose, 882 F.2d 976, 983 (5th Cir. 1989), *reh'g. denied*, 888 F.2d 1388 (5th Cir. 1989). In so holding, the Fifth Circuit relied almost exclusively on two cases it had previously rendered, *Clevenger v. Starfish & Oyster Co., Inc.*, 325 F.2d 397 (5th Cir. 1960) and *Claborn v. Starfish & Oyster Co., Inc.*, 578 F.2d 983 (1978), *cert. denied*, 440 U.S. 936 (1979). Those cases concluded that "in itself, a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is 'not equal in disposition and seamanship to the ordinary men in the calling.' " *Clevenger*, 325 F.2d at 402.

In those two cases, the Fifth Circuit cited *Boudoin* for the proposition that a seaman not equal in disposition and seamanship to the ordinary men in the calling can render a vessel unseaworthy. Yet the Fifth Circuit extended *Boudoin* in a manner which appears not to have been intended by this Court. *Boudoin*, in stating the above proposition, simply determined that

there was sufficient evidence in that case to support the conclusion of the fact finder at trial that the vessel was unseaworthy. This Court did not hold or suggest that the unseaworthiness issue was not properly placed before the finder of fact. The Fifth Circuit, however, in both *Clevenger* and *Claborn*, held, *as a matter of law*, that the respective vessels were rendered unseaworthy by the actions of particularly violent seamen. In the case at bar, the Fifth Circuit, disregarding the factual findings of the trier of fact and following the rationale of *Clevenger* and *Claborn*, determined as a matter of law that the M/V ARCHON was unseaworthy.

In support of its reasoning that, without considering any other factors, the savagery of the attack itself may be sufficient to render a vessel unseaworthy as a matter of law, the *Miles* panel cited *Smith v. Lauritzen*, 356 F.2d 171 (3rd Cir. 1966) for the proposition that the malevolent disposition of crewmember may be proved either "by independent evidence with regard to his disposition or by direct evidence showing that he launched a vicious and unprovoked attack." *Miles*, at 981. But neither *Lauritzen* nor the cases cited by *Lauritzen* (other than *Clevenger*) held or suggested that either method of proof was not to go to the fact finder at trial. The *Lauritzen* court did not hold as a matter of law that the vessel in question was rendered

unseaworthy even though the assault in that case involved a cargo hook, which, "like a 'devil's fork,' when used as an instrument of attack is an unmistakably dangerous or deadly weapon." *Lauritzen*, 356 F.2d at 177. Rather, the court remanded for a new trial because of erroneous jury charges on the unseaworthiness issue.

That unseaworthiness is an issue for the jury was made clear in *Walters v. Moore-McCormick Lines, Inc.*, 309 F.2d 191 (2d Cir. 1962), a case cited in *Lauritzen*. As the court stated at page 193:

> In those assault cases in which the issue of unseaworthiness has been held properly submissible to a jury, the hallmark has been either an assault with a dangerous weapon or independent evidence of the assailant's exceptionally quarrelsome nature, his habitual drunkenness, his severe personality disorder, or other similar factors.

The court thus specifically indicated that even when a dangerous weapon was used by the assailant, the unseaworthiness issue is for the jury.

The final case cited in *Lauritzen* for the proposition that unseaworthiness may be proved by "direct" or "independent" evidence, *Jones v. Lykes Bros. Steamship,*

Co., 204 F.2d 815 (2d Cir. 1953), resulted in a dismissal of the unseaworthiness count for lack of sufficient evidence. Thus, the case does not support the Fifth Circuit determination that such issues should not go to the jury.

In holding that the M/V ARCHON was unseaworthy, the Fifth Circuit emphasized those aspects of the evidence which would support a finding of unseaworthiness. Ignored was abundant testimony that Melrose was known as a "peace maker," an "excellent steward," a "considerate, real likeable guy," a "quiet, nice man" and the like. Ignored also was the evidence that Melrose was not known as a drinker or as having a violent temperament. Highlighted by the Fifth Circuit were portions of the testimony of a single individual, a chief steward and a former friend of the decedent, that Melrose was "on something" before the incident and "talked violence." Ignored was the testimony of the chief steward that he had known Melrose to drink on only one occasion (along with that chief steward) several days before the incident and that shortly prior to the incident, Melrose, though he was "on something," was not drunk, was not drinking and "carried himself very well." Cross-petitioner does not now, of course, suggest it is appropriate to place before this Court evidence which the jury had before it to

consider. Cross-petitioner merely suggests that it is not the place of the appellate courts to substitute their interpretation of the facts for that of the jury and raise a fact-specific inquiry into a matter of law.

In *Boudoin*, this Court appeared to have endorsed the trial court's consideration of various factors relating to the issue of whether the assailant was equal in disposition to the ordinary men in the calling, such as the nature of the assault, the sobriety of the assailant, the predisposition to belligerent and assaultive behavior, the general demeanor of the assailant, and the like.

In both *Clevenger* and *Claborn*, the Fifth Circuit emphasized that the assaults in those cases were sudden and *unprovoked*. In addition, *Clevenger* stressed that the assailant in that case was in command of the vessel at the time of the incident. In the case at bar, Melrose, who was not a licensed officer or even the head of the three-man steward's department, was not in a position of command aboard the M/V ARCHON. Furthermore, no one can say that Melrose's stabbing of the decedent was sudden or unprovoked. The incident was unwitnessed and the jury had evidence to consider which fairly could have led them to believe the attack was provoked, for example, discovery pleadings indicating the assailant acted in *self-defense*, and testimony

that the assailant had sustained wounds similar to the defensive-type wounds sustained by the decedent. Indeed, the jury instructions, to which petitioner did not object, specifically included the provocation of the assailant as a factor to consider.

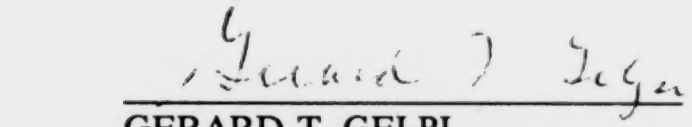
Cognizant of this Court's view in *Boudoin* that various factors should be considered when determining the unseaworthy issue, the Sixth Circuit, in *Harbin v. Interlake Steam Ship Company*, 570 F.2d 99 (6th Cir. 1978), *cert. denied*, 437 U.S. 905 (1978), noted that "it is the 'disposition' of the assailant, rather than simply the severity of the act that is material to the issue of unseaworthiness." *Harbin*, at 103. Furthermore, as stated by the court in a case involving repeated stabbings, *Mears v. American Export Lines, Inc.*, 457 F.Supp. 846, 847 (S.D. N.Y. 1978), "[T]his Circuit has never held that assault with a weapon, without more, establishes a vicious disposition as a matter of law." Yet, by looking only to the assault itself (which was not witnessed), the Fifth Circuit approach dispenses with the various factors traditionally considered in determining whether the actions of an individual render a vessel unseaworthy.

CONCLUSION

Imposing liability on a shipowner for unseaworthiness, a species of liability without fault, is a harsh remedy. Indeed, the scope of the unseaworthiness remedy is more far-reaching than land-based strict liability remedies. Strict liability is imposed in situations where the liable party had a genuine measure of control over the thing or person causing injury or damage, as in products liability actions, or actions against the parents for harm caused by their children, or against owners for harm caused by their vicious animals. Strict liability also has been imposed when injuries result from ultrahazardous activities on the theory that such activities should pay their own way. See W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Prosser & Keeton on Torts*, §75 at 536-37 (5th Ed. 1984). Yet, in the case at bar, the shipowner is held liable for the defects of a man's mind, a man whom the shipowner neither knew nor had any choice in accepting to work aboard his ship. It cannot be said that justice is done in imposing liability on the shipowner in such a situation. At most, it can be said a policy is served, whether wise or unwise.

It can be said, however, at the very least, that the issue of whether a vessel is unseaworthy or not is a matter for determination by the fact finder at trial. Cross-petitioner respectfully suggests that the decision of the court below has unjustifiably expanded this Court's *Boudoin* decision and is in conflict with decisions in other circuits to the effect that the unseaworthiness issue should be decided by the jury. Accordingly, cross-petitioner submits that review of the lower court's decision is required to establish uniformity in the maritime law and to set proper guidelines for the lower courts considering the unseaworthiness issue in personal injury and wrongful death litigation.

Respectfully submitted,



GERARD T. GELPI
Counsel of Record
RANDALL C. COLEMAN, III

Gelpi, Sullivan, Carroll & Laborde
430 Notre Dame Street
New Orleans, LA 70130-3610
Telephone: (504) 524-9714
Counsel for Cross-Petitioner